



The Circuit Court
for the Sixth Judicial Court of Michigan
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PONTIAC, MICHIGAN 48341-0404

MICHAEL WARREN
CIRCUIT JUDGE

April 4, 2008

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Corbin R. Davis
Clerk of the Michigan Supreme Court
P.O. Box 30052
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RE: ADM File No. 2006-16
Proposed Amendment of Rules 6.302 and 6.310 of the
Michigan Court Rules

Dear Mr. Davis:

I have reviewed with interest the proposed amendment to MCR 6.302 and 6.310 regarding pleas in criminal matters. Although well-intentioned, this proposal unnecessarily undermines federalism.

According to the staff comment, this amendment is proposed as it "would make the rules consistent with federal rules, which preclude judicial involvement in negotiating plea agreements and limit the ability of defendants to withdraw guilty pleas." This desire to implement a reform simply for the sake of consistency undermines federalism - a key of American liberty.

James Madison explained in *The Federalist Papers* that "[i]n the new [federal] government, as in the old, the general powers are limited . . . the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction."ⁱ "The federal and State governments," Madison reflected, "are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes."ⁱⁱ While the powers enumerated to the federal government were precise and few, "[t]hose which are to remain in the State governments are numerous and indefinite. [And] will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."ⁱⁱⁱ

Jefferson even went so far as to write that federalism is the best guarantor of liberty:

But the true barriers of our liberty in this country are our State governments; and the wisest conservative power ever contrived by man, is that of which our Revolution and present government found us possessed. Seventeen distinct States, amalgamated into one as to their foreign concerns, but single and

independent as to their internal administration, regularly organized with legislature and governor resting on the choice of the people, and enlightened by a free press, can never be so fascinated by the arts of one man, as to submit voluntarily to his usurpation.^{iv}

Federalism is also essential to the First Principle of the Social Compact. The essence of a republic is the ability of the governed to choose their representatives and hold them directly accountable for the decisions they make. If self-government is to have substantive and practical meaning, citizens must have a strong and direct influence on those vested with the authority to address issues. Thus, holding decision makers who affect local issues directly accountable to local voters is essential to the Social Compact. Moreover, only by participating in and influencing local decisions can citizens fulfill the promise of republican government and self-rule. By empowering local officials to address local problems, federalism maintains the Social Compact.

Similarly, because each State possesses the authority to legislate and adjudicate in its domain, each serves as a laboratory for approaches to addressing different issues. The same issue can be addressed differently by each of the several States - including in connection with the administration of justice. For example, States can take a variety approaches to alternative dispute resolution. One might choose to require ADR via facilitation; others may encourage voluntary efforts at mediation; and still others may discourage ADR all together. Similarly, alternative sentencing may be favored by some States, while others might favor stricter rates of incarceration. Some reforms might work well, while others might not work at all; others might work only in rural (or more urban) States. In any event, the citizens of each State should be free to determine the best solution for them. Not only can local issues be resolved more effectively by the State decision-makers, but States often find solutions that are more effective across the nation. By permitting each State to experiment with different approaches to the same problem, better solutions applicable (and adaptable) to other States are developed. National uniformity, on the other hand, imposes an inflexible standard solution throughout the entire nation, thereby stifling innovation and reform.

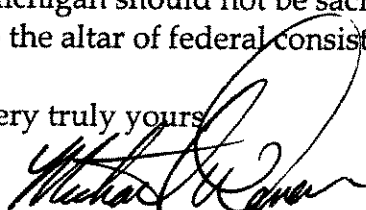
Maintaining the current system of taking pleas is in accord with federalism and furthers its principles. Michigan has chartered its own course - one different from the federal authority - that effectively serves the administration of justice. I am completely unaware of any clamoring by prosecutors, defendants, judges, lawyers, or the general public to turn topsy-turvy Michigan's system of criminal justice by eliminating *Cobbs* representations. To the contrary, over the last few years, with the strong encouragement and support of the Supreme Court, Michigan courts have reduced docket size, increased disposition rates, and eliminated backlogs and trial delays - all while maintaining fairness in the criminal justice system. Effective use of the *Cobbs* procedure is indispensable to these efforts; and eliminating *Cobbs* could very well unravel this progress. This proposal appears to be a solution looking for a problem.

One could argue that the proposal will have no discernible effect on federalism because it is taken voluntarily and is good public policy. However, the only policy articulated in the staff comment is lock-step uniformity with the federal system – and that mindset and justification only denigrates federalism.

That the federal government is not the oracle of good public policy or exemplar of superior governance is self-evident in today's troubling times. The presumption should be that Michigan should only implement policy reform that is well grounded and effective – and that consistency with federal or other authorities is an insufficient reason to effectuate change – especially one that strikes at the heart of the effective administration of justice. To the contrary, Michigan should seek to remain a vibrant, independent decision-maker and should jealously guard its traditions, culture, prerogatives, and constitutional authority.

Michigan should not be sacrificing its effective and independent system of justice to the altar of federal consistency.

Very truly yours



Hon. Michael Warren

CC: Chief Justice Clifford Taylor
Justice Michael F. Cavanagh
Justice Elizabeth A. Weaver
Justice Marilyn Kelly
Justice Maura D. Corrigan
Justice Robert P. Young, Jr.
Justice Stephen J. Markman
Michael Gadola
Judges of the Sixth Judicial Circuit

ⁱ*Federalist Paper No. 40.*

ⁱⁱ*Federalist Paper No. 46.*

ⁱⁱⁱ*Federalist Paper No. 45.*

^{iv}*Letter to A.L.C. Destutt de Tracy (1811).* Jefferson later elaborated in another letter:

No, my friend, the way to have good and safe government, is not to trust it all to one, but to divide it among the many, distributing to every one exactly the functions he is competent to. Let the national government be entrusted with the defence of the nation, and its foreign and federal relations; the State governments with the civil rights, laws, police, and administration of what concerns the State generally. . . . What has destroyed liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating of all cares and powers into one body. . . . [*Letter to Joseph Cabell (1816).*]